

**Blaine Larsen Farms, Inc. v Stanley Penn & Sons  
Feed Inc.**

2007 NY Slip Op 33765(U)

November 8, 2007

Supreme Court, Nassau County

Docket Number: 6823-04/

Judge: Karen Veronica Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 25 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy**  
**Justice of the Supreme Court**

\_\_\_\_\_  
**BLAINE LARSEN FARMS, INC.,**

**Plaintiff,**

**-against-**

**STANLEY PENN & SONS FEED INC., and  
WESTERN HAY NEW YORK, LLC,**

**Defendants.**  
\_\_\_\_\_x

**Index No. 16823/04**

**Motion Dated: 7/25/07  
8/08/07**

**Motion Submitted: 8/20/07  
Motion Sequence: 009, 010, 011**

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XXX
- Answering Papers.....X
- Reply.....XX
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....
- Transcript of Video Taped Deposition .....X

Defendants move this Court, for an Order, pursuant to CPLR § 3103, (1) prohibiting the Plaintiff Blaine Larsen Farms, Inc., from deposing George Miller, Esq.; and (2) an Order quashing a *subpoena duces tecum* served upon Miller.

By a separately noticed motion, Defendants move for an Order pursuant to CPLR § 3103 prohibiting the Plaintiff from filing and presenting a video-taped deposition of defendants witness, G. James Petteys.

Plaintiff cross moves pursuant to 22 NYCRR § 202.15[g], for an Order authorizing it to file the deposition of G. James Petteys.

In mid-2004, the Plaintiff Blaine Larsen Farms, Inc. [hereinafter "Blaine Larsen"] commenced the within action, alleging in sum, that it delivered some \$25,000.00 worth of alfalfa hay to co-Defendant Stanley Penn & Sons Feed, Inc. [hereinafter "Stanley"] for which it did not receive payment.

Significantly, and as noted in this Court's previously issued, November 6, 2006 Order, in 2004, co-Defendant Western Hay New York, LLC, [hereinafter "Western Hay"), a Utah limited liability corporation, acquired all Stanley's issued and outstanding shares from non-party Robert V. Penn – Stanley's then sole shareholder – and also agreed to assume certain of Stanley's outstanding liabilities (Stock Purchase Agreement; Pltff's Opp., Exh., "B" ¶ 3).

The instant matter ultimately appeared on this Court's Trial Calendar in January of 2007, but the Court (Brandveen, J.), issued an Order dated January 23, 2007, vacating the Note of Issue and placing the matter to the Trial Recertification Part, upon finding that "a material fact in the certificate of readiness" was incorrect and that the matter was not, in fact, ready for trial (see, *22 NYCRR § 202.21[e]*) (Defs' Exh., "1").

According to the Defendants, in preparing the case for trial, the Plaintiff did not depose witnesses but instead, elected to proceed by "serving multiple trial subpoenas" on the Defendants. The subpoena's were allegedly defective and made the subject of a motion to quash by the Defendants (Lynn Aff., ¶¶ 3-4). In response to the Defendants' motion to quash, the Plaintiff was allegedly unprepared to proceed to trial and requested – over the Defendants' objection – that the matter be marked off the calendar, after which Justice Brandveen issued the above-mentioned Order.

A Certification Conference was later held before Justice McCabe on February 27, 2007, and the parties executed a Stipulation pursuant to which the Plaintiff was permitted to depose "a person with knowledge of facts for both corporate defendants in Salt Lake City, Utah on or before April 20<sup>th</sup> 2007" (Defs' Exh., "2"). The Defendants argue that this witness was the only one mentioned by the Plaintiff at the time of the conference, and that they entered into the Stipulation "based on the understanding that the parties would proceed to trial" after this single deposition was completed (Lynn Aff., ¶ 11) – an assertion disputed by the Plaintiff.

On June 18, 2007, after delays in arranging the examination ensued – for which each side blames the other – the deposition of G. James Petteys, President and/or managing member of Western Hay, was conducted and videotaped in Salt Lake City, Utah. The Defendants were represented at the deposition by local Utah counsel (Lynn Aff., ¶ 7).

It is undisputed that the written Notice of Deposition served pursuant to the Stipulation did not contain a formal notice apprising the Defendants that the deposition would be videotaped, as required by 22 NYCRR § 202.15[c] (Ezra Aff., ¶ 2; Defs’ Exh., “3”). According to Plaintiff’s counsel, the decision to video tape the deposition was made at the last minute – or at least within a few days prior to the examination when the reporting service mentioned that videotaping was an option (Ezra Aff., ¶¶ 21-23). Counsel notes further that defense counsel did not register any objection to the taping – either before the deposition commenced or while it was being conducted (Ezra Aff., ¶ 25).

In late June of 2007, shortly after the Petteys deposition was completed, the Plaintiff served a Notice of Deposition and accompanying *subpoena duces tecum* upon non-party George Miller, Esq., an attorney who apparently represented Robert V. Penn – Stanley’s then sole shareholder – in connection with the 2004 sale of his stock to Western Hay (Lynn Aff., ¶¶ 8-9; Defs’ Exh., “3”). The subpoena demands the production of, *inter alia*, “every writing” entered into between Stanley and Western Hay relating to the 2004 asset sale and to the alleged obligation of Western Hay to pay for the products delivered by the Plaintiff – as well as documents relating to the sale of the shares “from or by any shareholder with the surname Penn to Western Hay \* \* \*” (Defs’ Exh., “3”).

The Defendant Stanley and Western Hay now move by separately noticed applications for an Order: (1) prohibiting the Plaintiff from deposing, non-party Miller and quashing the subpoena; and (2) for further relief precluding the Plaintiff from utilizing Petteys’ video-taped deposition.

The Court agrees that the Defendants have established their entitlement to a protective order with respect to the Notice of Deposition and subpoena served upon non-party George Miller, Esq. (see, *CPLR 3101*).

It is well settled that where, as here, discovery has been sought from a non-party, “special circumstances” must be demonstrated before the requested disclosure will be authorized (*see e.g., Doe v. Karpf*, 36 A.D.3d 652, 826 N.Y.S.2d 584 (2d Dept., 2007);

*Companion Life Ins. Co. of N.Y. v. All State Abstract Corp.*, 35 A.D.3d 519, 521, 829 N.Y.S.2d 536 (2d Dept., 2006); *Tannenbaum v. City of New York*, 30 A.D.3d 357, 358, 819 N.Y.S.2d 4 (1<sup>st</sup> Dept., 2006); *Attinello v. DeFilippis* 22 A.D.3d 514, 801 N.Y.S.2d 773 (2d Dept., 2005); *Lanzello v. Lakritz*, 287 A.D.2d 601, 731 N.Y.S.2d 763 (2d Dept., 2001); *see also, Moran v. McCarthy, Safrath & Carbone, P.C.*, 31 A.D.3d 725, 726, 819 N.Y.S.2d 538 (2d Dept., 2006); *Newman v. Lotwin*, 247 A.D.2d 318, 668 N.Y.S.2d 882 [1<sup>st</sup> Dept., 1998]]. The Plaintiff has not established the existence of special circumstances.

Indeed, the Plaintiff's claims with respect to the need for Miller's testimony are predicated upon vague, speculatively framed assertions, *i.e.*, attenuated claims to the effect, *inter alia*, that the Defendants' principals may have made undescribed statements to Miller at the purchase agreement closing – or at some other unspecified time – relating to the Defendants' purported contract liability to the Plaintiff (Ezra Aff., ¶¶ 16-17) (*e.g.*, *White Bay Enters. v. Newsday, Inc.*, 288 A.D.2d 211, 732 N.Y.S.2d 865 [2d Dept., 2001]). Further, the testimony's mere relevance – assuming that the projected testimony can be viewed as relevant – will not suffice to establish special circumstances (*Moran v. McCarthy, Safrath & Carbone, P.C., supra*, at 726; *Tannenbaum v. Tenenbaum*, 8 A.D.3d 360, 777 N.Y.S.2d 769 [2d Dept., 2004]).

Nor has the Plaintiff shown that the information now sought from Miller was unobtainable from alternative sources during the course of regular, pre-trial discovery (*see, Moran v. McCarthy, Safrath & Carbone, P.C., supra; Degliomini v. Degliomini*, 308 A.D.2d 501, 764 N.Y.S.2d 846 (2d Dept., 2003); *Tannenbaum v. City of New York, supra*, at 358) (*see, Lynn Aff.*, ¶ 20). Moreover, the *subpoena duces tecum* is overbroad and lacking in specificity since it demands, “every writing” and/or “all \* \* \* evidences,” which in any sense relate to the asset sale and the alleged obligation of co-Defendant Western Hay to pay for materials delivered to Stanley (*Matter of Fernald v. Vinci*, 5 A.D.3d 596, 772 N.Y.S.2d 860 (2d Dept., 2004); *White Bay Enters. v. Newsday, supra*).

The Court is persuaded by the Defendants' alternative assertion that the scope of discovery at this currently late stage of the proceedings was effectively defined by the February 27, 2007 Stipulation, which provides only for the deposition of a single witness – not the reopening of disclosure to the extent of authorizing the issuance of subpoenas and the noticing of a non-party depositions.

In light of the Court's determination, it is unnecessary to reach the Defendants' remaining contentions with respect to, *inter alia*, the application of the attorney-client and work-product privileges. However, the Plaintiff's cross-motion for an Order authorizing the use and filing of the video taped deposition of G. James Petteys, should be granted (see, 22 *NYCRR* § 202.15[g]). The Defendants' related motion for a Protective Order pursuant to CPLR § 3103, is denied.

"Generally, 'CPLR 3113 (b) and 22 NYCRR 202.12 and 202.15 freely permit a party taking a deposition to record it on videotape [and] [t]here is no requirement to show special need and videotaping may be employed over the objections of a bashful or reluctant witness'. . . . However, CPLR 3103(a) gives the courts wide discretion to preclude or appropriately limit the use of any particular disclosure device where it determines that the use of that device would cause unreasonable annoyance or embarrassment." (*Jones v. Maples*, 257 A.D.2d 53, 55-56, 691 N.Y.S.2d 429 (1<sup>st</sup> Dept., 1999); see, *Campaign for Fiscal Equity v. State of New York*, 271 A.D.2d 312, 706 N.Y.S.2d 411 (1<sup>st</sup> Dept., 2000); *EDP Med. Computer Sys. v. Sears, Roebuck & Co.*, 193 A.D.2d 645, 646, 597 N.Y.S.2d 461 [2d Dept., 1993]). The burden of proving entitlement to an Order of Protection rests with the party seeking it (*Vigilante v. Ghetto Kids*, 282 A.D.2d 672, 723 N.Y.S.2d 689 [2d Dept., 2001]).

Although the Plaintiff concededly did not adhere to the literal mandate of § 202.15[c] by supplying prior notice that the deposition was to be video taped, the Defendants neither interposed contemporaneous objections when the deposition was conducted, nor currently identify any particular technical infirmity in the taping process (see, 22 *NYCRR* § 202.15(d), [g]). Nor have they argued that the video taping caused, or was likely to cause, "unreasonable annoyance or embarrassment" to the witness (*Jones v. Maples, supra*; see also, *Campaign for Fiscal Equity, Inc. v. State of New York, supra*).

To be sure, the notice requirement imposed by the applicable rule is not to be lightly regarded. However, upon the constellation of relevant factors presented here, the Court agrees that an exercise of its discretion in favor of granting the Plaintiff's application is warranted (see, 22 *NYCRR* § 202.15[g]).

It is settled that, "[t]he supervision of discovery, and the setting of reasonable terms and conditions for disclosure, are within the sound discretion of the Supreme Court"

(*Provident Life & Cas. Ins. Co. v. Brittenham*, 284 A.D.2d 518, 727 N.Y.S.2d 142 (2d Dept., 2001) *see, Olexa v. Jacobs*, 36 A.D.3d 776, 829 N.Y.S.2d 564 [2d Dept., 2007]).

Lastly, the Court is unpersuaded by the Defendants' alternative claim that because the deposition was taped at a time when only local, Utah counsel was present, the Plaintiff, therefore, engaged in sharp practice and should be estopped from using the tape (Lynn Reply Aff., ¶ 11).

The Court has considered the parties' remaining contentions and concludes that none supports an award of relief beyond that granted above.

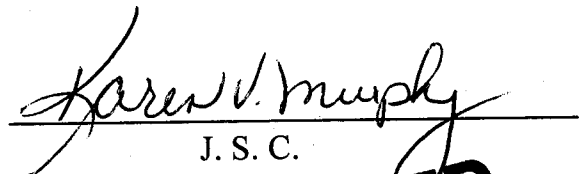
Accordingly it is,

**ORDERED** that the motion pursuant to CPLR § 3103 by the Defendants Stanley Penn & Sons Feed, Inc., and Western Hay New York, LLC, for: (1) a Protective Order prohibiting the Plaintiff Blaine Larsen Farms, Inc., from deposing George Miller, Esq.; and (2) a further Order quashing a *subpoena duces tecum* served upon Miller, is granted, and it is further,

**ORDERED** that the cross-motion by the Plaintiff Blaine Larsen Farms, Inc, pursuant to 22 NYCRR § 202.15[g], for an Order authorizing it to file the deposition of G. James Petteys, is granted; and the Defendants' motion for an Order prohibiting the filing of same, is denied.

The foregoing constitutes the Order of this Court.

Dated: November 8, 2007  
Mineola, N.Y.

  
J. S. C.

**ENTERED**

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NASSAU COUNTY  
COUNTY CLERK'S OFFICE